Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

JAMES T. WINKLER,*
STEVEN D. ATKINSON,
ATKINSON, ANDELSON, LOYA,
RUUD & ROMO,
911 Studebaker Road,
Suite 250,
Long Beach, Calif. 90815,
(213) 493-3571,
Counsel for Petitioner,
**Counsel of Record.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Reply Brief of Petitioner 1

TABLE OF AUTHORITIES CITED

Cases	Page
Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)	13
Amado Electric, Inc., 238 NLRB 37 (1978)	7
Authorized Air Conditioning Co., 236 NLRB 131 (1978)	7
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	11, 14
Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975)	2
Corrugated Structures, Inc., 252 NLRB 523 (1980)	4, 6
D'Angelo & Kahn, Inc., 248 NLRB 396 (1980)	6
Davis Industries, Inc., 232 NLRB 946 (1977)	7
Dee Cee Floor Covering, 232 NLRB 421 (1977)	3, 6
Eastern District Council v. Blake Construction Co., 457 F.Supp. 825 (E.D.Va. 1978)	15
Giordano Construction Co., 25[illegible] NLRB 10 (1981)	6
G.M. Masonry Co., 245 NLRB 267 (1979)	6
Haberman Construction Company, 236 NLRB 79 (1978)	7
Hageman Underground Construction, 253 NLRB 60 (1980)	6
Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974)	11, 12, 13, 14
International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.), 255 NLRB No. 83 (1981)	4
Kaiser Steel Corporation v. Julius Mullins, ___ U.S. ___, 109 LRRM 2268 (1982)	15, 19, 20
Land Equipment Incorporated, 248 NLRB 685 (1980)	3, 4, 8, 9, 10, 11

Page

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) 19

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 11, 12, 13, 14

NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.), 434 U.S. 335 ..... 2, 3, 4, 5, 8 ..... 11, 12, 13, 14, 17, 18, 19

North Haven Board of Education v. Bell, ___ U.S. ___, 50 L.W. 4501 (May 17, 1982) 18

Paddock v. Clark, 107 LRRM 2325 (D. Ore. 1980), rev'd, No. 80-3380 (9th Cir. March 2, 1981), petition for cert. filed (U.S. April 19, 1982) 10, 11

Quad C. Corp., 246 NLRB 463 (1979) 6, 7

R.J. Smith Construction Co., 191 NLRB 693 (1971) 1, 2, 4, 5, 6, 10, 15, 17

Ruttman Construction, 191 NLRB 701 (1971) .. 4, 6, 14

San Diego Trades Council v. Garmon, 359 U.S. 236 (1953) 12

Smith v. Evening News Ass'n., 371 U.S. 195 (1962) 8, 12, 14

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 11, 14

Trust Fund v. McDowell, 103 LRRM 2219 (W.D. Wash. 1979), revs'd, No. 80-3024 (9th Cir. March 2, 1982), petition for cert. filed (U.S. May 28, 1981) (No. 81-2209) 10, 18

Washington Area Carpenters Welfare Fund v. Overhead Door Co., 681 F.2d 1 (D.C. Cir. 1982) 14, 15, 19

Miscellaneous Page

The Multiemployer Pension Plan Amendment Act of 1980: Summary and Analysis of Consideration, Senate Committee on Labor and Human Resources (Committee Print), pp. 43-44 17

Statutes

Labor Management Relations Act, Sec. 301 ..... 6, 8, 11, 12, 13, 18
Labor Management Relations Act, Sec. 301(a) ... 11, 12
Labor Management Relations Act, Sec. 306(a) 16, 18, 20
Labor Management Relations Act, Sec. 306(b) 16, 18
Labor Management Relations Act, Sec. 308 17
Labor Management Relations Act, Sec. 308(a) 16, 17, 18
Labor Management Relations Act, Sec. 308(b) ... 16, 18
National Labor Relations Act, Sec. 3(b) (29 U.S.C. § 153(b)) 7
National Labor Relations Act, Sec. 3(d) (29 U.S.C. § 153(d)) 7
National Labor Relations Act, Sec. 8(a)(5) 1, 4, 5, 6, 7, 8, 14, 15, 18
National Labor Relations Act, Sec. 8(b)(7)(C) 4
National Labor Relations Act, Sec. 8(d) (29 U.S.C. § 158(d)) 15
National Labor Relations Act, Sec. 8(f) 1, 2, 4, 5, 8, 13, 14, 18, 19, 20
National Labor Relations Act, Sec. 9 (29 U.S.C. § 159) 7
National Labor Relations Act, Sec. 10 (29 U.S.C. § 160) 7
United States Code, Title 29, Sec. 186 19

No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER.

1. *Respondents' Position Conflicts With Board Policies.* Respondents urge that the starting point for interpreting Section 8(f) is the language of the statute itself and that "absent a clearly expressed legislative intention to the contrary" such language is conclusive. Petitioner does not quarrel with this proposition,[1] but must point out what Respondents and all of their supporting amici curiae have ignored. Section 8(f) is an exception to the general rule, founded on *basic* employee rights, that prehire agreements are in and of themselves unlawful. It is a basic tenet of statutory construction that exceptions to general rules are to be narrowly construed. Accordingly, the Board and this Court have re-

[1]Using Respondents' argument, the Board formulated its policy by noting that the "language of the section, as enacted, clearly suggests the limits of its effect". *R. J. Smith*, 191 NLRB 693 at 694. The Board reasoned that Congress intended to allow inquiry into a union's status not only through an election but at any time during a Section 8(a)(5) proceeding and refused, retroactively and prospectively, to enforce the agreement.

peatedly construed the exceptions of Section 8(f) narrowly. This Court in *NLRB v. Local Union No. 103, Iron Workers (Higdon Contracting Co.)*, 434 U.S. 335 at 345 specifically held that the exception is of limited scope.[2]

The Board and this Court have noted two reasons for Congressional enactment of Section 8(f): (1) prehire agreements help the employer know his labor costs before preparing bids for construction contracts; and (2) prehire agreements allow the union to provide a supply of skilled craftsmen ready for quick referral. *Higdon*, 434 U.S. at 348; *R. J. Smith Construction Co.*, 191 NLRB 693 at 694.

The Board's position, adopted by this Court in *Higdon*, that minority prehire agreements are not enforceable confines the exception of Section 8(f) to the purposes of its enactment. Respondent and its supporting amici curiae seek to expand the exception by creating additional "purposes" for its enactment and by interpreting the exception broadly. The Board's position was ably summarized in its brief in *Higdon*.

> In summary, these principles may be distilled from the Board decisions above: Where a union with a prehire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement and the union is not permitted to force such compliance by prolonged recognitional picketing. If the union does in fact represent a majority, the employer is required to honor the agreement and the union does not violate Section 8(b)(7) by picketing to force compliance.

---

[2]In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 at 631 n.10 (1975), this Court reviewed a case urged by a party as support for its position and noted that the "agreement in question may have been a prehire agreement under Section 8(f), and it is not clear that the contractor argued that it was invalid for lack of a collective bargaining relationship."

> While the foregoing principles do not give conclusive effect to pre-hire agreements, they by no means render pre-hire agreements "an exercise in futility" or "virtually unenforceable"; rather, they provide reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them. Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor. Where, as Congress assumed would generally be the case, the union does represent a majority of the employees later hired, the union can enforce adherence to the pre-hire contract, through unfair labor practice proceedings or picketing, just as a union signatory to a standard collective agreement could do. Brief for Petitioner, pp. 27-28, *Higdon*, 434 U.S. 335 (1978).

The Board was correct. These principles do serve the purposes which Congress intended. It is very important to note that neither Respondents nor any of their supporting amici curiae have cited a single case in which an employer obtained union members from the union pursuant to a prehire agreement and then avoided the contract's obligations. The Board enforces such contracts on a jobsite by jobsite basis because the union obtains its majority on those jobsites. *Dee Cee Floor Covering*, 232 NLRB 421 (1977).[3] Respondent and their supporting amici curiae, however, adopt cases and policies which enforce minority prehire agreements where the employers receive none of the benefits envisioned by Congress.

---

[3]And, if the union achieves a majority in a permanent and stable unit of employees, the Board drops its jobsite by jobsite approach and enforces the agreement for its entire duration. *Land Equipment Incorporated*, 248 NLRB 685 (1980).

Respondents acknowledge the two reasons stated for Congressional enactment of Section 8(f). Yet Respondents add a third element of legislative history: Congress wished to enable construction unions "to stabilize employment conditions in a geographic area over a period of years." Brief for Respondents, pp. 14, 16. Respondents do not cite any legislative history to support this supposed Congressional intent. This analysis of Congressional intent is also missing from all of the amici curiae briefs.

Respondents ultimately contend that legislative history reveals that minority prehire agreements are enforceable until the Board certifies that the union has lost a representation election. Yet this is the exact position taken by the District of Columbia Circuit in reversing the Board in *R. J. Smith* and *Higdon*. It is precisely this analysis which the Board attacked in its petition and briefs to this Court in *Higdon*.

Nevertheless, Respondents contend that the Board supports their interpretation of Section 8(f). Initially, Respondents note that the Board has refused to find a violation of Section 8(b)(7)(C) where a union picketed to obtain "alleged past obligations" under a prehire agreement when the union did not seek current recognition. *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 NLRB No. 83 (1981). To begin with, the Board did not find the agreement to be enforceable in Section 8(a)(5) proceedings. Its position to the contrary has been consistent. *R. J. Smith Construction Co.*, 191 NLRB 693 (1971); *Ruttmann Construction*, 191 NLRB 701 (1971); *Corrugated Structures, Inc.*, 252 NLRB 523 (1980); *Land Equipment Incorporated*, 248 NLRB 685 at 686, n.4 (1980). Indeed, the Board continually labeled the union's claim as an "alleged" past obligation.

The Board noted that the Act's election provisions could not solve the underlying dispute in the case. Section 8(b)(7)(C) has specific provisions calling for expedited elec-

tions to solve recognitional issues during the urgency of picketing. The entire mechanism of the section revolves around the filing, and the timing of such filing, of an election petition. The whole purpose of the section is to solve an immediate problem, not a past problem. Section 8(a)(5), however, by its nature, always looks to past conduct. In *R. J. Smith*, the Board went to great lengths to emphasize that majority status can be raised *at any time* in Section 8(a)(5) proceedings to negate the enforcement of minority prehire agreements.

The coverage of Sections 8(b)(7)(C) and 8(a)(5) are not coextensive. In its brief in *Higdon*, the Board emphasized to this Court that the sanctions of Section 8(b)(7)(C) do not prohibit all recognitional picketing. If a petition is timely filed, the union can picket beyond thirty days, and, even without a petition, the union can usually picket thirty days without violating Section 8(b)(7)(C). But this does not mean that minority prehire agreements are enforceable for thirty days or for any other period coextensive with Section 8(b)(7)(C) functions. Furthermore, Section 8(f) issues arise in 8(b)(7)(C) cases to determine only if an affirmative defense can be raised that picketing is not for initial recognition. In *Higdon*, the Board held that to allow the affirmative defense in an 8(f) context would permit a union to obtain through the "back door" what it could not obtain through the front door. But the entire affirmative defense is not relevant if a union is not seeking current recognition.[4] The fact that the "back door" is structurally inoperative does not mean that the front door should be closed accordingly.

---

[4]Since the affirmative defense is not relevant, it makes no difference whether the "alleged" past obligation arose under a prior minority agreement or under a prior majority status collective bargaining agreement. The case simply has nothing to do with the minority status of a labor organization.

Respondent also contends that the Board's case in *Giordano Construction Co.*, 256 NLRB No. 10 (1981), stands for the proposition that the Board supports judicial enforcement of minority prehire agreements until certification of a union's loss of majority status. Brief for Respondents, pp. 24-25. Respondents assume that the employer simply wished to test the views of employees and did not contend that the contract was "automatically avoided by its breach, or by repudiation". But *Giordano* was a representation case and these issues are simply not relevant to representation issues.

Respondents contend that *Giordano* demonstrates a construction union's difficulty in establishing majority status and a contract bar. Yet the union was quite able to develop a full record establishing the union's majority status on a series of individual jobsites. If the employer had not complied with the agreement on any of these prior jobsites, it would be subject to remedial action pursuant to Section 8(a)(5) or Section 301 litigation. Furthermore, if the union had shown its majority to be in a permanent and stable unit, the employer would not be free to "automatically avoid" the agreement. Respondents' further contention that the Board did not treat the agreement as a nullity, merely that the agreement would not bar an election, confuses the purposes of representation hearings with unfair labor practice proceedings. In Section 8(a)(5) proceedings, the Board has consistently refused to enforce, retrospectively, minority prehire agreements. *Corrugated Structures, Inc.*, 252 NLRB 523 (1980); *D'Angelo & Kahn, Inc.*, 248 NLRB 396 (1980); *G. M. Masonry Co.*, 245 NLRB 267 (1979); *Dee Cee Floor Covering*, 232 NLRB 421 (1977); *Ruttmann Construction*, 191 NLRB 701 (1971); *R. J. Smith Construction Co.*, 191 NLRB 693 (1971). Similarly, in Section 8(a)(5) cases, the Board has routinely enforced such agreements upon a showing that the union enjoyed majority status. *Hageman Underground Construction*, 253 NLRB 60 (1980); *Quad*

C. Corp., 246 NLRB 463 (1979); *Amado Electric, Inc.*, 238 NLRB 37 (1978); *Authorized Air Conditioning Co.*, 236 NLRB 131 (1978); *Haberman Construction Company*, 236 NLRB 79 (1978); *Davis Industries, Inc.*, 232 NLRB 946 (1977).

2. *Litigation of Majority Status.* Respondent's arguments are based on a rather glaring misunderstanding of Board procedures and the differences between representation and unfair labor practice proceedings. Respondents contend that the courts should not determine majority status because "courts have no access to a secret ballot election process". Brief for Respondents, p. 30. But the General Counsel has no availability to the Board's election procedures in a Section 8(a)(5) proceeding. All of the cases in which the Board has enforced the terms of prehire agreements based on majority status have been on proof of union support without an election. Respondents state:

> When the General Counsel of the NLRB rules that the union has failed to provide sufficient proof of prior attainment of majority status, the ultimate result is an election to decide the issue. Brief for Respondents, p. 31.

Nothing can be further from the truth. The General Counsel does not "rule" on majority status. The General Counsel, as the agency's prosecutor, alleges that a union has majority status *in an unfair labor practice proceeding* and an administrative law judge or the Board rules on his proof, not on election results. Furthermore, the General Counsel, by statute, plays no role in representation proceedings.[5] The

---

[5]Under Section 3(d) of the Act [29 U.S.C. Section 153(d)] the General Counsel is responsible for matters under Section 10 of the Act [29 U.S.C. Section 160] involving the prevention of unfair labor practices.

Under Section 3(b) of the Act [29 U.S.C. Section 153(b)] the Board is responsible for matters under Section 9 of the Act [29 U.S.C. Section 159] involving representation proceedings.

General Counsel simply has no authority to direct an election in a Section 8(a)(5) proceeding or any other proceeding.

Respondents and the Carpenters Trust Funds[6] argue that litigation of majority status would involve representation issues which are best left to the Board's expertise. Representation issues, as well as unfair labor practice issues are often left for the Board's exclusive domain.[7] But this Court has held that courts, under Section 301, and the Board have concurrent jurisdiction when unfair labor practices also constitute breaches of a collective bargaining agreement. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). Where the very enforceability of an agreement necessitates an examination of majority status issues, there is no reason to erode the concurrent jurisdiction of the Board and courts. The Board supported this approach in its reply brief in *Higdon* when it urged that prehire agreements were enforceable in Section 301 litigation if the union demonstrates majority status, the argument adopted by this Court.

Furthermore, the argument by the Carpenters Trust Funds makes no sense. Unlike Respondents, they support the notice of repudiation rule adopted by the court below. Yet, as noted by the court below, majority status issues will still have to be litigated before a court to determine if a notice of repudiation is proper.

An example of a union's ability to establish majority status in litigation is the case of *Land Equipment Incorporated*, 248 NLRB 685 (1980), a case in which Respondents herein participated. Operating Engineers Local 12 filed a Section 8(a)(5) charge alleging that two companies, as a single employer, violated the Act by refusing to comply

---

[6]The amici curiae Carpenters Trust Funds for Southern California, the Construction Laborers Trust Funds for Southern California and the Cement Masons Trust Funds for Southern California are herein referred to collectively as Carpenters Trust Funds.

[7]Indeed, if an election petition is filed it would be best for a court to defer to the election process.

with a prehire agreement. The Trustees of the Local 12 Trust Funds, Respondents herein, intervened and participated in the Board proceedings. The administrative law judge rejected an argument urged by Respondents that the mployer must "void" a "voidable" agreement before it can raise the defense of a lack of majority status — the position taken by the court below:

> General Counsel and the Trusts argue that Section 8(f) merely makes a contract voidable and that Respondent did not void the contract since it continued to utilize the hiring hall and to adhere to the contract as to "Land employees." The Board has rejected a similar argument in *Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Higdon Contracting Company)*, 216 NLRB 45 (1975). Thus, it is necessary to inquire into the Union's majority status. *Id.* at 689.

The judge then found that the union represented a majority in what was a permanent and stable complement of employees and ordered the employer to adhere to the agreement, including payments to the trust funds, "retroactively and prospectively." *Id.* at 690. Since the employer had concealed its noncompliance from the majority representative, the Board's statute of limitations did not bar the judge from ordering retroactive compliance beyond the statute of limitations. *Id.* at 690, n.10. On review, the Board agreed with the judge's findings. *Id.* at 685, n.2 and n.4. However, the Board limited retroactive compliance to the date the union achieved majority status. *Id.* at 686 n.4.

The *Land Equipment* case, and the many other Board cases finding majority status in prehire cases, negates the unsubstantiated cry of Respondents and their supporting amici curiae that Petitioner's position will make it impossible for unions or trust funds to establish majority status on either a jobsite by jobsite basis, or, as in *Land Equipment*, in a stable and permanent complement of employees. The

Board routinely admits as evidence union membership to establish majority support in these cases. Although such evidence is not conclusive, the employer's burden of overcoming the presumption has rarely, if ever, been met.

3. *Conflicting Policies of the Board and the Court Below*. Although Respondents attempt to reconcile their position with Board policy, they eventually, as do all of their supporting *amici curiae*, rely on the principle that different policies should apply in 301 litigation versus unfair labor practice litigation. The problem this creates is illustrated by *Land Equipment*.

In *Land Equipment*, the Board adhered to its policy first formulated in *R. J. Smith* that it would not retroactively enforce prehire agreements to a point in time when the union did not have majority status despite specific findings in both cases of active concealment by the employers of their noncompliance. Yet the court below used such conduct as the very foundation of its holding:

> It is precisely this sort of action by an employer, enjoying the benefits of a prehire agreement and *misleading the union as to the employer's intention of never performing its obligation*, which has led us to adopt this view of the voidability of these contracts. (Emphasis added.) *Petition for Writ of Certiorari*, Appendix A, p. 8.

Initially, it is suspect for the court below to make such a finding based on an issue which was not addressed by any party in the motions for summary judgment. It is even more suspect to use such a finding on a non-issue to base a broad policy to rule in all cases even when no "concealment" is found. The court below has summarily reversed district court decisions which were based on Board policy even though no "concealment" was found. *Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *rvs'd*, No. 80-3024 (9th Cir. March 2, 1982), petition for cert. filed (U.S. May 28, 1981) (No. 81-2209); *Paddock v. Clark*,

107 LRRM 2325 (D. Ore. 1980), *rvs'd*, No. 80-3380 (9th Cir. March 2, 1982), petition for cert. filed (U.S. April 19, 1982).

In *Land Equipment* the Board also adhered to its policy enunciated in *Higdon*, that it would not require an "active" repudiation, or notice of such, before it determines the enforceability of a prehire agreement based on majority status. The policy of the court below is clearly in conflict.

Land Equipment highlights the problem this Court sought to cure in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). In *Land Equipment*, Respondents herein utilized the Board's procedures to obtain relief retroactive to a point in time when the union first obtained majority status. If Respondents' position before this Court is upheld, Respondents will be able to take that same claim to another forum to obtain relief prior to such point in time based, not on a different interpretation of the facts, but, upon policies specifically rejected by the prior forum.

4. *Respondents' Position Conflicts With Established Authority*. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), this Court held that the substantive law to be applied in Section 301 must be fashioned from the *policy* of our national labor laws.

Following *Lincoln Mills*, this Court encouraged the increase of forums to determine labor contract disputes, but has made every effort to ensure that a uniform labor policy be maintained. In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), this Court, in permitting state courts to resolve such issues, specifically noted that the "basic purpose of Section 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." *Id.* at 508. This Court noted that "diversities and conflicts" may occur because of this, but noted that one of the "traditional functions of this Court" was to resolve such diversities. One month later, in *Local*

174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), this Court ruled that state courts must apply federal labor law in exercising their concurrent jurisdiction with federal courts. This Court stated that the subject matter of Section 301(a) "is peculiarly one that calls for uniform law" noting that "the existence of possibly conflicting legal *concepts*" and "the possibility of conflicting substantive interpretation under competing legal *systems*" would be disruptive to the entire field of labor relations. (Emphasis added) *Id.* at 104.

This Court has taken the same approach in making the Board's proceedings compatible with the role of the courts under Section 301. In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) this Court adhered to its position of expanding forums to decide labor contract disputes. Where the breach of a labor contract is also an unfair labor practice, this Court continued its refusal to apply the preemption doctrine first espoused in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1953):

> The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301. *Smith v. Evening News*, 371 U.S. at 197.

As *Smith v. Evening News* implies, there are areas where the two jurisdictions do not overlap, but where they do, this Court has demanded uniformity. In *Howard Johnson*, this Court held that "basic policies" controlling in unfair labor practice litigation may not be disregarded by the courts under Section 301. *Howard Johnson*, 417 U.S. at 256. Furthermore, this Court looks first to the Board to determine federal labor policy. In *Higdon*, this Court stated that the "function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor

Relations Board, subject to limited judicial review." *Higdon*, 434 U.S. at 350.

The case relied upon by Respondents and their supporting amici curiae to distinguish this line of cases is *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In *Pittsburgh Plate Glass*, this Court determined that a unilateral midterm modification of a collective bargaining contract which affects not "active" employees but already retired employees, was not a violation of the National Labor Relations Act. The basic decision of this Court was that retired employees are not "employees" within the meaning of the National Labor Relations Act. This Court noted, however, that these retired employees may have a remedy under Section 301.

Yet no one is contending that individuals not covered by the Act may not have a remedy under Section 301. The plain fact is that construction employees *are* covered by the Act. Several sections of the Act, including Section 8(f), are devoted to their specific concerns.

The basic weakness of the oppositions' arguments is that they all seek to interpret statutory policy behind Section 8(f) of the National Labor Relations Act to support their positions under Section 301. But, the legislative history behind Section 8(f) now being analyzed is the same legislative history analyzed in *Higdon*. Most of the positions taken by Respondents and their supporting amici curiae are the same arguments advanced in opposition to the Board's interpretation of legislative history in *Higdon*. They simply contend that their once defeated arguments should apply because the forum is different. This is the very evil of conflicting legal "concepts" and "policies" and "competing legal systems" which this Court condemned in *Lucas Flour* and *Howard Johnson*.

The government's amicus curiae brief is most illuminative in this regard because of its series of specious arguments. The government urges that Board concerns under Section

8(a)(5) of the Act are different than "the concerns of a court applying federal contract law in a Section 301 suit." Brief for the United States, p. 18. But courts do not apply "contract law" in isolation. They apply federal *labor* law. The government speaks of "[t]his distinction between contractual obligations and statutory obligations"[8] as if this Court's decisions in *Lincoln Mills, Charles Dowd, Lucas Flour, Howard Johnson* or *Smith v. Evening News* never existed.

The conflict of the Board with the government's position is evident in the government's underlying argument:

> A Section 8(f) contract *both* serves as a preliminary step to the union's achieving status as bargaining representative, and also "sets the compensation for services rendered to the employer while the agreement remains in effect." *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 9 (D.C. Cir. 1982). (Emphasis added.) *Brief for the United States*, p. 5.

From this, the government reasons that the set compensation is enforceable until a notice of repudiation is delivered.

The government's premise conflicts with the Board's consistent and repeated pronouncements that prehire agreements are "merely" a preliminary step and "only" a preliminary step. The Board has made this statement in numerous cases and it repeated it in its briefs to this Court in *Higdon*.[9] There is not one Board case which has ever said that a prehire agreement is "both" a preliminary step and also a set compensation for services pending majority status. Furthermore, the concept that a prehire agreement is "both" a preliminary step and an enforceable set compensation for services is an

---

[8]Brief for the United States, p. 18.

[9]*Ruttmann Construction*, 191 NLRB 701 at 702 (1971); *Local Union No. 103 (Higdon Contracting Co.)*, 216 NLRB 45 at 46 (1975); Brief for Petitioner, p. 25, *Higdon*, 434 U.S. 335 (1978); Reply Brief for Petitioner, p. 7, *Higdon*, 434 U.S. 335 (1978).

internally inconsistent concept. The Board rationale contemplates additional events after the preliminary step in order to make the agreement enforceable. Finally, the government cites only the District of Columbia Circuit's decision in *Overhead Door* to support this position. But this is tantamount to citing the case in review as support for affirmance of the case in review. The court below and the District of Columbia Circuit are the only circuits to adopt what the court below labeled "the middle ground." Using a bootstrapping argument as the foundation for its presentation reveals the weakness of the government's position.[10]

5. *The 1980 ERISA Amendments*. The National Coordinating Committee for Multiemployer Plans ("NCCMP") contends that the 1980 amendments to ERISA require that Petitioner cannot raise the minority status of a union as a defense to a suit brought by trustees. Not one of the circuits has adopted this analysis.

The underlying analysis of NCCMP was rejected by this Court in *Kaiser Steel Corporation v. Julius Mullins*, ___ U.S. ___, 109 LRRM 2268 (1982) when it refused to imply a repeal of the labor laws "which may be raised as a defense to a provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." In addition, the history of the legislation does not support NCCMP's position.

---

[10]Unlike Respondents and the AFL-CIO, the government and the Carpenters Trusts adopt the notice of repudiation rule of the court below. The Loyola Law Review adopts alternate arguments and favorably notes *Eastern District Council v. Blake Construction Co.*, 457 F.Supp. 825 (E.D. Va. 1978) where the district court "borrowed" the sixty day notice of termination provisions set forth in Section 8(d) of the Act [29 U.S.C. Section 158(d)] and held that the terms of a minority prehire agreement terminate sixty days following notice of intent to terminate.

Yet "borrowing" some Board law and some Board policy only highlights the conflict with Board policies. In the Board's landmark *R. J. Smith* decision, the Board not only held that the employer did not violate Section 8(a)(5) of the Act, it also did not violate Section 8(d) of the Act. The Board policy that notice requirements are not to be imposed on employers in minority prehire cases is clear.

Section 306(a) of the amendments should not be viewed in isolation. Section 306(b) plays an integral part in the legislative history of its counterpart. Furthermore, it must be remembered that this provision was a minor issue in a very detailed and lengthy statute which had, as its primary purpose, the creation of an obligation on employers who withdraw from participation in multiemployer pension plans to continue making payments until they fund an aliquot share of the plan's unfunded liabilities.

The forerunner to 306(a) and (b) was the Senate version Section 308(a) and (b) which read, in substantial part:

> [a] Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.
>
> [b] In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, an additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended.

These provisions are substantially the versions finally adopted by Congress in Sections 306(a) and (b).

The Senate Committee on Labor and Human Resources, in April 1980, published a 253 page detailed account and analysis of the entire legislation. After discussing the leg-

islation's primary provisions in this document, the Committee turned to the "miscellaneous provisions." The analysis of the Committee concerning Section 308 was set out in total in NCCMP's brief (pp. 15-16) without benefit of titles. The analysis, in pertinent part, reads:

F. MISCELLANEOUS PROVISIONS

* * *

3. *Delinquent Contributions (Bill Section 308; proposed ERISA section 515)*

* * *

> The bill imposes a Federal statutory duty to contribute on employers that are *already* contractually obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. *The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies* (Emphasis added). The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, Senate Committee on Labor and Human Resources (Committee Print), pp. 43-44.

As the subtitle implies, this integrated analysis was applicable to the entire Section 308, not just 308(a). The first part of the section was intended to codify what were "already" contractual obligations. The second part was to provide the teeth to the section by providing for substantial penalties. It is important to note that the provision was very detailed, as was the majority of the legislation. The Senate had no trouble in setting forth its intentions in detailed terms.

The Committee's print was published nine years after the Board, in *R. J. Smith*, determined that minority prehire agreements are not enforceable; two years after this Court in *Higdon* stated that "the union's majority standing is sub-

ject to litigation in a Section 301 suit to enforce a Section 8(f) contract just as it is in a Section 8(a)(5) unfair labor practice proceeding"; and after post- *Higdon* decisions held that minority prehire agreements are not enforceable. *Trust Fund v. McDowell*, 103 LRRM 2219 (1979). Despite various cross-references to other statutes in the legislation, including a cross-reference to the Internal Revenue Code in Section 308(b), there is no mention of a repeal or modification of Section 8(f) either in the legislation or its analysis. Furthermore, there is no language that suggests that minority prehire agreements are to be enforced.

Despite this, NCCMP notes various floor remarks by ex-Senator Williams and ex-Congressman Thompson and contends that their remarks be given substantial weight, citing this Court's decision in *North Haven Board of Education v. Bell*, ___U.S. ___ , 50 L.W. 4501 (May 17, 1982). In *New Haven*, this Court noted that statements of legislators made during debate are not necessarily controlling. However, the legislator involved in *New Haven* was a "sponsor of the language ultimately enacted" and his remarks were to be given greater weight in the circumstances of the case. This Court noted that the legislation to be interpreted involved floor amendments, that no committee reports were available to discuss the provisions, and the legislator's remarks were, therefore, the "only authoritative indications of congressional intent." 50 L.W. at 4504.

But a detailed analysis of the legislation in this case *is* available and it does not support the position of NCCMP. Furthermore, Thompson was not the "sponsor of the language ultimately enacted." The House did not even have a counterpart to the Senate's Section 308(a).[11] Also, his statement that pension plans should recover in suits "without regard to issues which might arise under labor-

---

[11]NCCMP points to legislative history of Section 306(a), almost in isolation to 306(b), to support its position.

management relations law — other than 29 U.S.C. Section 186" has already been rejected by this Court in *Kaiser*. If the Senate Committee on Labor and Human Resources had intended to limit defenses to 29 U.S.C. Section 186, it could have easily drafted the legislation to specifically say so, or at least it would have declared its intent in its printed analysis. Finally, Williams and Thompson did not discuss Section 8(f) of the Act, minority prehire agreements, or even the construction industry in their remarks quoted by NCCMP. The statements are general statements regarding the purpose of the provisions to aid trust funds in the collection of delinquencies. NCCMP amplified on their remarks by describing one of the quoted cases, the district court decision in *Overhead Door*. But this description was not contained in the legislators' remarks which do not, in themselves, reflect any intent to modify Section 8(f) or this Court's *Higdon* decision. More importantly, the generalized statements would not *communicate* such intent to the other legislators. Furthermore, the quoted remarks cite approval of this Court's decision in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) as opposed to the district court decision in *Overhead Door*. But *Lewis v. Benedict Coal* is not inconsistent with the district court's decision in *Overhead Door*. (See this Court's discussion of *Lewis v. Benedict Coal* in *Kaiser*, 109 LRRM at 2272.) It is not clear what the legislators intended by their remarks and it is certainly not clear that the intent urged by NCCMP was communicated to the other legislators.

It should not be forgotten that the position taken by NCCMP contemplates rather substantial ramifications. This Court was correct in rejecting such consequences in *Kaiser* based on "scraps of legislative history."[12] The NCCMP would have one believe that these substantial effects were born in a "miscellaneous provision" within complex liti-

---

[12]*Kaiser*, 109 LRRM at 2275, n.13.

gation when such consequences were never communicated to the members of Congress. In this regard, the argument presented by NCCMP that it could not find "any statement in the legislative record" contradicting Williams' and Thompson's statements, actually defeats its ultimate argument. If Congress had intended to modify Section 8(f) or to enforce minority prehire agreements, it would have created substantial comment and testimony on the subject. This simply did not occur.

The ultimate weakness of NCCMP's argument lies in its attempt to make its analysis compatible with *Kaiser*, in which this Court rejected appeals by implication and held that Section 306(a) codified existing case law. NCCMP repeatedly states that Congress intended to clarify existing law and denies that any implicit repeal or modification of Section 8(f) is involved.

If the NCCMP is correct that the law adds nothing new, the initial inquiry is, why is it raising the issue? Its attempt to adapt its argument to *Kaiser* is a non sequitur. It guts the heart of the dissenting opinion in *Kaiser* that labeled as "clearly erroneous" the majority's opinion that, "§306(a) [is] merely declaratory of pre-existing case law." *Kaiser*, 109 LRRM at 2276. To appeal to the majority, the NCCMP forfeited its foundation.

For these reasons, as well as those set forth in Petitioner's opening brief, the case should be remanded to the court below to make findings of fact and conclusions of law as to whether the Union had achieved majority status and whether the prehire agreement was voluntarily executed.

Respectfully submitted,

JAMES T. WINKLER,*
STEVEN D. ATKINSON,
ATKINSON, ANDELSON, LOYA,
RUUD & ROMO,
Counsel for Petitioner,
**Counsel of Record.*